Document:-

A/CN.4/SR.1176

Summary record of the 1176th meeting

Topic:

Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-

1972, vol. I

itself to be assimilated to a dependent territory. On all appropriate occasions it had gone to some lengths to emphasize the difference between its status and that of a dependency.

67. The State practice on which the provisions of paragraph 2 were based provided strong evidence of the appreciation by the international community, and in particular by its judicial organs, of the fact that a protected State retained some kind of international personality. Nevertheless, the old-fashioned term "protected State" unfortunately placed too much emphasis on form and too little on the substance.

68. During the discussion, certain small States of Europe had been cited as possible examples of dependent territories. In his opinion, those cases need not give rise to much concern, for under traditional international law, very small States which were recognized members of the international community—if for example, they were parties to the Statute of the International Court of Justice—could not be confused with dependent territories.

69. There was more room for concern with regard to associated States or territories, which were of two kinds. The first included areas which had exercised real autonomy for so long that their status as self-governing entities had never been questioned. The second was that of territories which had not been self-governing but which, in the full light of international surveillance, had emerged to self-governing status and had freely chosen to do so in association with an existing State.

70. Viewed in that light, the provisions of paragraph 2 would be seen to be really concerned not so much with protection as with representation. The substance of sub-paragraph (*a*) was likely to be subsumed by the provisions of the article on federations.

71. The idea in sub-paragraph (*b*) was of considerable importance in the context of associations of States and he hoped that some place would be found for it in the article on unions or federations.

72. As far as the wording was concerned, he would urge the retention of the important formula "by its own will", which went to the heart of the matter. On the other hand, he did not favour the retention of the formula "in its own name", which placed the emphasis on form rather than on substance. It might prove difficult for an associated State to contract in its own name because of inhibitions on the part of the other contracting State. The other State might be willing to sign an agreement relating to the territory of the associated State, an agreement to which the associated State might succeed later on attaining independence, but it might at the same time not wish to contract with the associated State in the latter's own name because such a procedure would raise the whole question of the status of associated States under international law.

73. He hoped that the questions he had mentioned would be taken up by the Commission in connexion with article 19.

74. Mr. USHAKOV, referring to paragraph 2 (*b*), asked who decided whether the former protected State had become a party to a treaty "by its own will". If it was a State other than the successor State, that was incompatible with the successor State's sovereignty. If it was the successor State itself, that was tantamount to recognizing the successor State's freedom of choice and its right to give notification or otherwise, which was the situation provided for in the preceding articles.

75. The CHAIRMAN, speaking as a member of the Commission, said that there was unanimity as to the great value of the Special Rapporteur's commentary but there was anything but unanimity on the question of the text of article 18.

76. As he saw it, the subject dealt with in paragraph 2 was important. The application of the provisions of sub-paragraph (*b*) would depend on the determination whether the protected State had become a party to a treaty "by its own will". In order to decide that issue, it might be necessary to investigate such matters as whether the authorities of the protected State represented a puppet régime, or a government with authority of its own based on free elections. The practical problems involved in settling that issue led him to the conclusion that the net result to be expected from the provisions of paragraph 2 (*b*) was not worth the difficulties likely to be encountered in their application.

77. Paragraph 2 (*a*) raised the question whether it was worthwhile to embody in a draft article the effect of the decision by the International Court of Justice in the Rights of Nationals of the United States of America in Morocco case,[12] which seemed to him reasonable. That decision, however, also gave rise to difficult problems of proof as to a question of fact, namely, whether it was not the will of the protecting power rather than that of the protected State which was involved in maintaining the treaty in effect. That was not as complicated a problem as the previous one.

78. Nevertheless, he was inclined to share the views of those members who favoured dealing with those matters in other contexts.

The meeting rose at 1.5 p.m.

[12] *I.C.J. Reports 1952*, p. 176.

1176th MEETING

Friday, 9 June 1972, at 10.20 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. El-Erian, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/256; A/CN.4/L.183)

[Item 1 (*a*) of the agenda]

(continued)

ARTICLE 18 (Former protected States, territories and other dependencies) *(continued)*

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 18 of his draft (A/CN.4/256).

2. Sir Humphrey WALDOCK (Special Rapporteur), said that the majority of members had expressed themselves in favour of dispensing with a special article on the lines of article 18, on the understanding that some aspects of its contents would be covered by a revision of the definition of the term "new State", or "newly independent State", and some other aspects in connexion with unions of States.

3. The main inspiration of the articles in part II, which related to cases of emergence into independence, had been drawn from the process of so-called decolonization which was now almost terminated. Since protected States had been involved in that general process, it would be somewhat illogical not to consider whether to include in part II any provisions relating to those States.

4. His purpose in submitting article 18 had been to make the Commission consider whether there were any grounds for laying down special rules for particular categories of dependent States.

5. Paragraph 1 of the article might seem necessary in order to remove doubts as to whether mandates and trusteeships had any special characteristics in that respect. The point had to be disposed of because in the books the suggestion was made that class A mandates were comparable to protected States. It was argued that the end of the mandate gave rise more to a change of government than to a true succession.

6. He had not himself proposed any definition of the term "protected State" but if paragraph 2 of article 18 were retained, such a definition would undoubtedly be necessary because of the many variations of constitutional relations covered by the term.

7. It would be for the Commission to decide whether, for the reasons stated in paragraph (1) of the commentary (A/CN.4/256), it might not be desirable to avoid including in the draft any reference to the vanishing protectorate system.

8. Subject to that consideration, he wished to make it clear that it was not only paragraph 2 but also paragraph 1 which applied to protected States. The "clean slate" principle applied to those States, except on the points mentioned in paragraphs 2 (*a*) and 2 (*b*). Those two sub-paragraphs reflected the relevant State practice as described in the commentary.

9. There had been considerable discussion of the problem of associated States. That type of association covered a variety of relationships. In some cases, there was a similarity with unions of States, whereas in some others, associated territories were not very distinguishable from dependent territories.

10. Some associated States actually resembled protected States. The fundamental difference between a modern associated State and a protected State of the colonial era was that, in the case of the latter, there was often doubt as to the voluntary character of the operation whereby the foreign relations of the protected State had been entrusted to the protecting Power. The modern case of the Cook Islands, on the other hand, was that of a freely established association where the treaty-making power had been handed over to New Zealand but the associated State was at liberty to reject a particular treaty. In point of fact, that situation was very similar to the position until recently of the protected Kingdom of Tonga.

11. Other examples could be given, such as that of Puerto Rico, the association of which with the United States had been approved by the United Nations and which retained its absolute freedom to ask for its independence; constitutionally, treaty-making power for Puerto Rico was vested in the Federal Government of the United States.

12. In the case of the Netherlands Antilles, the association was reflected in the fact that there was a single crown for different territories; there was a constitutional relationship which vested treaty-making power in the Netherlands Government, subject to certain safeguards for the territory of the Netherlands Antilles.

13. There were, in addition, the older relationships existing between Liechtenstein, Monaco and San Marino and certain powers, to which reference had been made during the discussion. There was also the special relationship between Belgium and Luxembourg, whereunder economic treaties were concluded by Belgium on behalf of the two countries but were actually signed separately by both of them.

14. Members would recall that, in his draft on the law of treaties, he had originally introduced provisions on the subject of the capacity to make treaties on the part of dependent territories and on the representation of one State by another in the treaty-making process.[1] None of those draft provisions had survived the discussions in the Commission,[2] so that they had not even been submitted to the Vienna Conference on the law of treaties.

15. The interesting question had been raised by Mr. Reuter of a United Nations trusteeship where there was no administering Power in the shape of a State, but an administering Power in the shape of the United Nations.[3] There was no practice on that point and his own feeling was that, when the problem arose, it was likely to be settled *ad hoc* in each case. Presumably, a case of that kind would be governed by a General Assembly resolution. The United Nations had, of course, taken part in the creation of new States such as Libya and of the relationship between Eritrea and Ethiopia arising out of the termination of trusteeship, and some very nice questions could arise as to what really was the legal

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[1] See *Yearbook of the International Law Commission 1962*, vol. II, p. 36.

[2] *Ibid.*, vol. I, pp. 57-71.

[3] See 1173rd meeting, para. 78.

status of the General Assembly resolutions which was the basis of the constitution which was established.[4] But the Commission could not go into problems of that nature at the present stage and he would suggest that article 18 might now be referred to the Drafting Committee.

16. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 18 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

17. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft articles proposed by his Committee, contained in document A/CN.4/L.183.

18. Mr. USTOR, Chairman of the Drafting Committee, said that the Commission had instructed the Drafting Committee[6] to consider the question of the general provisions which would ultimately form part I of the draft. The Drafting Committee had considered the matter and now proposed that part I, entitled "General Provisions", should consist of articles 0, 1, 1 *(bis)*, 1 *(ter)*, 1 *(quater)*, 3, 4 and 5. Article 2 would form part II, entitled "Transfer of territory from one State to another".

19. The texts of articles 0, 1 *(bis)*, 1 *(ter)* and 1 *(quater)*, adopted by the Drafting Committee on the basis of texts proposed by the Special Rapporteur, were to be found in document A/CN.4/L.183, which also contained articles 2 and 3.

20. In accordance with its usual practice, the Committee had deferred consideration of article 1, on the use of terms, until it had completed its work on the other draft articles. It had nevertheless taken two decisions concerning that article: the first was to include in it the definition of the term "treaty" appearing in article 2 of the 1969 Vienna Convention; the second related to article 0 which, if the Commission agreed, he would now introduce.

It was so agreed.

ARTICLE 0

21. Mr. USTOR, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 0:

Article 0
Scope of the present articles

The present articles apply to the effects of succession of States in respect of treaties between States. (A/CN.4/L.183).

22. The Drafting Committee had considered it desirable to include in the draft an article corresponding to article 1 of the Vienna Convention on the Law of Treaties.[7]

23. The purpose of article 0 was to make it clear that cases of succession of subjects of international law other than States were outside the scope of the draft. The Committee had therefore used the new term "succession of States" instead of the term "succession" defined in paragraph 1 (*a*) of the Special Rapporteur's article 1.[8] The new term would naturally be used throughout the draft whenever reference was made to the actual fact of succession and would, of course, replace the term "succession" in article 1.

24. In order to avoid any ambiguity as to the meaning of the term "succession" in the present context, the Committee had used the phrase "the effects of succession" so as to indicate that the term "succession" referred to the fact of the change of sovereignty and not the impact of succession.

25. The Committee had not as yet taken any decision as to whether article 0 should be the first or the second article of the draft but he assumed, on the pattern of the Vienna Convention, that it would be the first.

26. The CHAIRMAN, speaking as a member of the Commission, said that, instead of introducing into article 1 a set of definitions, such as that of "treaty", taken from the 1969 Vienna Convention, it would be preferable to add a general clause to the effect that the meanings specified for particular terms in article 2 (Use of terms) of the Vienna Convention were also to be given to those terms for the purposes of the present articles, unless the draft indicated that they were used with a different meaning.

27. It was true that the formula he suggested would involve the method of incorporation by reference, to which some members objected, but it was justified in the present circumstances; the draft articles were in effect intended to form an addition to the 1969 Vienna Convention.

28. Mr. USHAKOV said that in his view a provision should be added reproducing paragraph 1 (*a*) of article 2 of the Vienna Convention on the Law of Treaties, which specified that "treaty" meant an international agreement concluded between States in written form. That definition was not included anywhere in the draft.

29. Sir Humphrey WALDOCK (Special Rapporteur), said that he himself had proposed a formula such as that now suggested by the Chairman. It had taken the form of paragraph 1 of article 1 (Use of terms) in his first report.[9] He realized, however, that the present draft, particularly articles 2 and 3, would be more easily understood by anyone unfamiliar with the Vienna Convention if a definition of the term "treaty" were included

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[4] *Official Records of the General Assembly, First Session*, resolution 289 (IV).

[5] Draft article 18 was subsequently deleted for the reasons explained in paragraph (6) of the commentary to article 1 (A/CN.4/L.187/Add.19) (article 2 of the final text of the draft), and in footnote 25 of the report of the Commission.

[6] See 1167th meeting, para. 84.

[7] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

[8] See *Yearbook of the International Law Commission 1969*, vol. II, p. 50.

[9] See *Yearbook of the International Law Commission 1968*, vol. II, p. 90.

in the article on the use of terms. For similar reasons, definitions of the terms "reservation", "contracting State", "party", and "international organization" should also be included; they should be drafted on the pattern of paragraphs 1 (*d*), 1 (*f*), 1 (*g*) and 1 (*i*) of article 2 of theVienna Convention. He did not believe that it would be necessary to introduce into the present draft any of the other definitions in the Vienna Convention.

30. Mr. TSURUOKA said that, since the scope of the draft articles had been changed, consideration should perhaps be given to the possibility of amending the title.

31. Sir Humphrey WALDOCK (Special Rapporteur), said that the same restriction of scope had been introduced into the draft on the law of treaties, but no change had been made in the title and the 1969 Vienna Convention had been adopted as the Convention on the Law of Treaties.

32. Mr. NAGENDRA SINGH said he supported article 0. It was fully appropriate to follow the precedent of the 1969 Convention.

33. The CHAIRMAN said that, if there were no further comments, he would consider that the Commission approved article 0 as proposed by the Drafting Committee.

Article 0 was approved.[10]

ARTICLE 1 *(bis)*

34. Mr. USTOR, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 1 *(bis)*:

Article 1 (bis)
Cases not within the scope of the present articles

The fact that the present articles do not apply to the effects of succession of States in respect of international agreements concluded between States and other subjects of international law or in respect of international agreements not in written form shall not affect:

(*a*) The application to such cases of any of the rules set forth in the present articles to which they would be subject under international law independently of these articles;

(*b*) The application as between States of the present articles to the effects of succession of States in respect of international agreements to which other subjects of international law are also parties. (A/CN.4/L.183)

35. As a result of the introduction of article 0 and of the Drafting Committee's decision concerning the definition of the term "treaty", various categories of agreements were excluded from the scope of the draft articles. It had therefore been considered necessary to include in the draft a provision on the lines of article 3 of the Vienna Convention in order to safeguard the potentially relevant principle embodied in the draft articles in respect of agreements not within the scope of the draft.

36. The Committee now therefore proposed article 1 *(bis)* which, a part from necessary drafting changes, differed from article 3 of the Vienna Convention in two respects. First, the words "or between such other subjects of international law" in the introductory sentence had been omitted, since a case of succession in respect of treaties between subjects of international law other than States clearly would not be a succession of States. Secondly, the article contained no provision corresponding to sub-paragraph (*a*) of article 3 of the Vienna Convention, since such a provision would not be relevant in the present text.

37. Sub-paragraph (*b*) was an adaptation of sub-paragraph (*c*) of article 3 of the Vienna Convention to the present context: the words "as between States" had been used so as to limit the impact of the draft articles to the relations of States, in order not to bind other subjects of international law.

38. The CHAIRMAN said that, if there were no comments, he would take it that the Commission approved article 1 *(bis)* as proposed by the Drafting Committee.

Article 1 (bis) *was approved.*[11]

ARTICLE 1 *(ter)*

39. Mr. USTOR, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 1 *(ter)*:

Article 1 (ter)
Treaties constituting international organizations and treaties adopted within an international organization

The present articles apply to the effects of succession of States in respect of:

(*a*) Any treaty which is the constituent instrument of an international organization without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization;

(*b*) Any treaty adopted within an international organization without prejudice to any relevant rules of the organization. (A/CN.4/L.183)

40. The Committee had deemed it desirable to include in the draft articles a provision to parallel article 5 of the Vienna Convention. It had considered, however, that in the context of succession, instruments constituting international organizations and treaties adopted within an international organization raised different problems. With respect to the second category, the Committee had followed the language of article 5 of the Vienna Convention.

41. As for constitutional instruments of international organizations, the question had been raised in the Committee whether it could really be said that the draft articles applied to constituent instruments at all, since sub-paragraph (*b*) of article 7 in the Special Rapporteur's third report [12] excluded those instruments from the right of notification and, moreover, membership in an international organization was generally governed by the

[10] Article 0 was adopted without change at the 1197th meeting.

[11] Article 1 *(bis)* was adopted without change at the 1197th meeting.

[12] See *Yearbook of the International Law Commission 1970*, vol. II, p. 37.

relevant rules of the organization and not by the law on succession of States.

42. The Committee had, however, noted that succession in respect of a constituent instrument was not necessarily limited to a question of membership; it had therefore adopted a text which, in respect of constituent instruments, contained the general reservation concerning the relevant rules of the organization and a specific reservation concerning the rules on acquisition of membership.

43. The CHAIRMAN asked whether it would result from the provisions of sub-paragraph (*a*) of article 1 *(ter)* that a successor State might become a party to the treaty which was the constituent instrument of an organization without at the same time becoming a member of that organization.

44. Mr. USTOR, Chairman of the Drafting Committee, said that the purpose of the provisions of sub-paragraph (*a*) was to draw a distinction between the rules concerning acquisition of membership and the other rules of the organization.

45. Sir Humphrey WALDOCK (Special Rapporteur), said that the provisions of sub-paragraph (*a*) had been introduced *ex abundanti cautela*. The wording that he himself had proposed to the Drafting Committee had been somewhat different: "... only to the extent that the rules of membership admit and without prejudice to any other relevant rules of the organization".

46. The practice showed that, in a large majority of cases, the rules concerning membership negatived any real application of succession. The "moving treaty-frontiers" rule, however, applied. In addition, there were certain organizations such as BIRPI in which the rules of succession had at times been applied. There was also the interesting case of the action taken by the United States Government as depositary of the constituent instrument of IAEA with regard to the readmission of Syria following the breaking up of the UAR; both States had approached the matter as one of succession.

47. Therefore, to say outright that the rules in the present articles did not apply would be as false as saying that they did apply, without taking some special account of the rules concerning membership.

48. The CHAIRMAN, speaking as a member of the Commission, said that he preferred the language originally proposed to the Drafting Committee by the Special Rapporteur.

49. Mr. YASSEEN said that in his view the two cases were different. There were, on the one hand, the rules concerning acquisition of membership, subject to which the articles formulated by the Commission could apply to the constituent instrument of an international organization, and on the other hand, the relevant rules of the organization concerning succession to the constituent instrument, which were not the same.

50. He could accept the wording of sub-paragraph (*a*), but would like to suggest that the word "other" be deleted from the second reservation, in order to make it clearer.

51. Mr. REUTER said he could accept the proposed text but thought it would require some explanation in the commentary.

52. What Mr. Kearney and Mr. Yasseen had said was not without foundation. He himself did not interpret the formula "any other relevant rules" as referring only to the rules relating to succession itself. In his view, the reservation concerning the relevant rules was sufficient in itself, since the rules concerning acquisition of membership were part of them. The purpose of sub-paragraph (*a*) was precisely to call attention to that fact. A provision of that kind was not absolutely necessary, but it was valuable in so far as it emphasized that to be a party to the constituent instrument of an international organization might be different from being a member of the organization.

53. Mr. USHAKOV said he would have preferred some other wording and, although as a member of the Drafting Committee he had accepted the present wording, he would like to be sure that the formula used obviated the need to make reservations in other articles of the draft.

54. Mr. USTOR, Chairman of the Drafting Committee, said that the purpose of sub-paragraph (*a*) was clearly to lay down a reservation which operated for all the articles. There was therefore no need to introduce a reservation in any of the other articles.

55. Mr. TSURUOKA said the difficulty could perhaps be overcome by reversing the order of the two reservations and saying: "without prejudice to any relevant rules of the organization, including those concerning acquisition of membership". That would express the idea better, since the rules concerning acquisition of membership were part of the relevant rules of the organization.

56. Mr. EL-ERIAN said that he found article 1 *(ter)* satisfactory in that it provided for the application of the draft articles without prejudice to the rules concerning acquisition of membership. Its provisions were consistent with existing practice. In the case of the fusion of two member States and later re-emergence of the original member States, the General Assembly had taken a pragmatic approach.

57. As to the proviso "without prejudice to any other relevant rules of the organization", it was appropriate to retain that broad language in order to cover any unexpected situations that might arise in the future.

58. Mr. REUTER said he supported Mr. Tsuruoka's suggestion.

59. Mr. BILGE said he would have preferred there to be no mention of the rules concerning acquisition of membership, since they were part of the relevant rules of the organization; it would be sufficient to explain the matter in the commentary.

60. If the two reservations were maintained, it would be more logical to state them in the order proposed by Mr. Tsuruoka. There again, however, everything depended on what explanation was given in the commentary.

61. Sir Humphrey WALDOCK (Special Rapporteur), said that the idea put forward by Mr. Tsuruoka had been duly considered by the Drafting Committee but the Committee had felt that there was an advantage in commencing with the proviso relating to the rules concerning acquisition of membership. Those rules would exclude, in

four-fifths of the cases, the application of the rules on State succession.

62. Mr. USTOR, Chairman of the Drafting Committee, said that, like the Special Rapporteur, he was not in favour of reversing the two provisos in sub-paragraph (*a*).

63. Mr. NAGENDRA SINGH said that the basic principle in the matter was that the rules of the organization were paramount. The proposed wording of article 1 *(ter)* did not state that principle clearly enough.

64. Sir Humphrey WALDOCK (Special Rapporteur), said that although he himself was not enamoured of the formula "without prejudice to", he appreciated that it was necessary to adhere to it because it had been used in the 1969 Vienna Convention.

65. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved the text of article 1 *(ter)* on the understanding that, if it had an opportunity, the Drafting Committee would take into account the comments of members on the wording.

On that understanding, article 1 (ter) *was approved.*[13]

ARTICLE 1 *(quater)*

66. Mr. USTOR, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 1 *(quater)*:

Article 1 (quater)
Obligations imposed by international law independently of a treaty

The fact that a treaty is not in force in respect of a successor State as a result of the application of the present articles shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty. (A/CN.4/L.183)

67. Article 1 *(quater)* was modelled on article 43 of the Vienna Convention (Obligations imposed by international law independently of a treaty). The Drafting Committee deemed it desirable to include such a provision in the draft articles in order to make it clear that the non-continuance in force of a treaty upon succession in no way relieved the successor State of obligations embodied in the treaty which were also obligations under international law independently of the treaty.

68. Mr. TSURUOKA said that he approved of the contents of article 1 *(quater)* but hoped that the Drafting Committee would reconsider the translation of the word "subject", which had been rendered in French by "*soumis*".

69. Mr. USTOR, Chairman of the Drafting Committee, said that he assumed that the French version followed that of article 43 of the Vienna Convention. If that were so, he hoped that Mr. Tsuruoka would be satisfied.

70. Mr. TSURUOKA said that he was fully satisfied by Mr. Ustor's explanation.

71. Mr. RAMANGASOAVINA said that he endorsed the principle stated in the article, which was fully consistent with the progressive development of international law. Any State was bound, even if only morally, by a treaty which had been accepted by such a large number of States that it could be considered a part of customary law.

72. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved article 1 *(quater)*.

Article 1 (quater) *was approved.*[14]

ARTICLE 2 [15]

73. Mr. USTOR, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 2:

Article 2
Transfer of territory from one State to another

1. When territory under the sovereignty or administration of a State becomes part of another State:

(*a*) Treaties of the predecessor State cease to be in force in respect of that territory from the date of the succession; and

(*b*) Treaties of the successor State are in force in respect of that territory from the same date, unless it appears from the particular treaty or is otherwise established that the application of the treaty to that territory would be incompatible with its object and purpose.

2. Paragraph 1 is without prejudice to the provisions of article 22 [Territorial treaties]. (A/CN.4/L.183)

74. It had been agreed in the Drafting Committee that article 2 should be removed from part I, "General Provisions", and should constitute a separate part II of the draft as a whole. The situation of the transfer of territory from one State to another represented a special case of succession and did not belong to the general provisions.

75. The phrase "under the sovereignty or administration of a State" was intended to cover the various possible situations, including that of trust and non-self-governing territories, which had been recognized as having "under the Charter a status separate and distinct from the territory of the administering State." [16]

76. The Drafting Committee had considered it more logical to reverse the order of paragraphs 1 (*a*) and (*b*).

77. It had also considered it necessary to include paragraph 2 in order to reserve the case of territorial treaties, on which the Special Rapporteur intended to submit a separate article.

78. The question had been raised in the Committee whether it should not be stated that, in the situation envisaged by the article, the predecessor State was released from its treaty obligations. The Committee, however, had taken the view that that might be going too far in the case of certain treaties, such as technical assistance agreements, where the predecessor State might retain

[13] Article 1 *(ter)* was adopted without change at the 1197th meeting.

[14] Article 1 *(quater)* was adopted without change at the 1197th meeting.

[15] For previous discussion, see 1158th meeting, para. 19, to 1159th meeting, para. 39.

[16] Report of the Special Committee on Principles of International Law concerning Friendly Relations and Cooperation among States, *Official Records of the General Assembly, Twenty-fifth session, Supplement No. 18*, p. 69.

some obligation as a guarantor. It had been agreed that that point should be mentioned in the commentary.

79. Mr. ALCÍVAR, speaking also on behalf of Mr. Castañeda, proposed that the word "legally" ("*de modo legitimo*") be inserted before the words "becomes part of another State", in paragraph 1.

80. Mr. USTOR, Chairman of the Drafting Committee, said that the Drafting Committee had considered, in the light of the discussion in the Commission as a whole, the possibility of drafting a general article on the lawfulness of transfers of territory. It had felt, however, that it was self-evident that the present article applied only to lawful transfers and that it might therefore be better not to include a general article on the subject, since otherwise the door might be left open to the possibility of bad faith in the interpretation of those drafts previously adopted by the Commission which did not include similar provisions. The question was one which could be discussed either in connexion with article 2, or later in connexion with the general provisions.

81. The CHAIRMAN invited members to comment on Mr. Alcívar's formal proposal to insert the word "legally" before the words "becomes part of another State", in paragraph 1.

82. Mr. TABIBI said that he supported Mr. Alcívar's proposal, although for the English version he would prefer the word "lawfully" to the word "legally". The inclusion of that word was very necessary in article 2, since even the devolution treaties concluded by the United Kingdom frequently referred to "valid treaties". Alternatively, the question might be postponed until the Commission discussed the general provisions.

83. Mr. TSURUOKA suggested that article 2 be approved, either in its present form or in a slightly modified version, on the understanding that at a later stage the Commission would consider whether further elucidation should be given in the commentary or whether a separate provision should be added.

84. Mr. ALCÍVAR said that he had no objection to Mr. Tabibi's suggestion; the article would, after all, be merely provisional and would be submitted to Governments for their comments. He proposed, therefore, that the word "lawfully" be for the time being placed within square brackets and that the Commission make it clear in its commentary that it had not yet taken a final decision in the matter.

85. Mr. SETTE CÂMARA said that, while he had some sympathy for the proposal put forward by Mr. Alcívar and Mr. Castañeda, he wondered whether it was really necessary. The Commission was dealing with normal legal situations of the transfer of territory from one State to another, and could hardly be expected to deal with illegal situations which had been brought about by conquest.

86. Personally he would prefer to retain article 2 as it stood.

87. Mr. USHAKOV said that all members seemed to be in favour of Mr. Alcívar's idea, since it was evident that the article covered only lawful or legal situations. If that point were made clear in the text of article 2, it would also have to be specified in the articles dealing with other cases of succession. In such circumstances it would be preferable to prepare a general provision which would apply to the draft as a whole.

88. With regard to the title of the article, he would point out that a territory placed under the administration of a State did not constitute a part of that State's territory. Either the words "from one State to another" should be deleted or it should be explained in the commentary that the heading was not entirely in conformity with article 1.

89. Mr. RAMANGASOAVINA said that he supported the idea of the amendment to indicate that the territory had been acquired "legally", not unlawfully, but the notion of legality suggested a link with the domestic law of the State and so might seem to call its competence into question. Since some States promulgated annexation laws, the word "legally" seemed hardly precise enough.

90. The purpose of the amendment was to indicate that the transfer of territory must be in accordance with international law, in other words, was accepted by the international community. That idea would be better expressed by the wording "becomes an integral part of another State", thus excluding the possibility of a unilateral act of annexation.

91. Mr. BILGE said it was obvious that the situations covered by the draft must be legal or lawful, which meant in conformity with international law and with the Purposes and Principles of the Charter. If the Commission made that point clear only in article 2, it might be concluded that unlawful situations were not excluded in other cases of succession. It would therefore be better if the question were dealt with in a general article.

92. Mr. TSURUOKA said he could accept both the substance and the form of article 2 but would like the Chairman of the Drafting Committee to explain why the idea of treaty-making competence had been excluded and the idea of administration introduced.

93. Mr. ALCÍVAR said that article 2 dealt with the case where a territory under the sovereignty or administration of one State passed under the sovereignty of another State. In the latter event, it would be a non-self-governing territory, a former colony, which had not yet achieved complete independence and statehood. In neither event was there any formation of a new State.

94. The case of the transfer of territory under the moving treaty-frontiers rule represented a special situation which was quite distinct from the others dealt with in the draft. It should not therefore be dealt with among the general provisions. Moreover, in view of the special nature of the case, the inclusion of the word "lawfully" was undoubtedly necessary.

95. The Commission had originally considered it better to include a general provision which would cover all such cases and the Special Rapporteur had accordingly submitted two alternatives, but it had eventually been decided that they caused more problems than they solved.

96. The CHAIRMAN said that the Commission should not become involved in questions of drafting at the present stage, but should try to discuss the principle involved in Mr. Alcívar's proposal. It should also consider whether

it would be necessary to include a reservation to article 2 and whether that question should be a controlling or a secondary issue.

97. Mr. USTOR, Chairman of the Drafting Committee, suggested that the Commission dispose of article 2 and reserve its position on the question whether to include a general article on the question of the lawfulness of the transfer of territory.

98. Mr. BARTOŠ said that in article 2 the transfer of sovereignty and the transfer of administration had been seriously confused. When a territory was placed under the administration of a State, the latter did not exercise sovereignty over that territory and could not transfer it. It could relinquish its administration, which then passed to another State, but that did not mean that there was a succession of States. The case was therefore completely extraneous to succession and should be considered separately. History furnished many examples of territories placed under the administration, but not the sovereignty, of a State. One administering State had often been replaced by another without there being any succession. He would have no objection to article 2 if the words "or administration" were deleted.

99. Sir Humphrey WALDOCK (Special Rapporteur), said that article 2 did not cover the transfer of territory from one administering State to another; it dealt with the case where territory which was not under the sovereignty of any State was administered by a State as a trusteeship or non-self-governing territory and subsequently became a part of another State. He might refer, for example, to the situation which had existed when part of the Cameroons had become part of Nigeria.

100. He agreed that the words "transfer of territory" in the title were unfortunate, since the principle embodied in article 2 applied equally to cases where there was no real transfer. His original language, in fact, had referred to the "passing of territory".

101. Mr. Ushakov had suggested the deletion of the words "from one State to another" in the title; that was a possible solution, but the rule would not then correctly represent the situation of the passing of territory. The purpose of the article was merely to indicate that territory had moved from the treaty régime of one State to that of another. The present provisions were correct, but he personally did not like the use of the word "transfer".

102. The question remained whether a general article could be drafted to safeguard the point of the lawfulness of a transfer of territory. As Special Rapporteur, he had originally provided for two alternatives, first that of a negative reservation and, secondly, that of a more affirmative one. He personally favoured the negative reservation and was prepared to produce a text along those lines.

103. The CHAIRMAN said that it would undoubtedly be better to consider a concrete text rather than continue to discuss the question in abstract terms. He suggested, therefore, that the Commission defer its decision on article 2 until it had had an opportunity to examine the Special Rapporteur's new text.

104. Mr. TABIBI said that he supported that suggestion.

It was so agreed.

The meeting rose at 1.5 p.m.

1177th MEETING

Monday, 12 June 1972, at 3.20 p.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Organization of future work

[Item 7 of the agenda]

STATEMENT BY THE LEGAL COUNSEL

1. The CHAIRMAN said that the Commission was fortunate in having with it Mr. Constantin Stavropoulos, the Legal Counsel of the United Nations. He invited Mr. Stavropoulos to address the Commission.

2. Mr. STAVROPOULOS (Legal Counsel) said that he would like first to congratulate members on their election to the Commission for the term starting on 1 January 1972. As in the elections which had taken place in 1948, 1953, 1956, 1961 and 1966, the General Assembly, in its wisdom, had elected in 1971 candidates who possessed the "qualifications required" in the highest degree, and had ensured the representation in the Commission "of the main forms of civilization and of the principal legal systems of the world".[1]

3. The Commission was in an excellent position to take a new and important step forward during the next five years in its task of promoting the progressive development of international law and its codification. As he had stated in 1971 in his introduction to the Secretariat's "Survey of International Law" (A/CN.4/245), much had already been done by the Commission during the past twenty-three years, particularly in regard to the law of the sea, diplomatic and consular law and the law of treaties, but much still remained to be done.

4. It would be the Commission's privilege to take up the Olympic torch and to remove from some other fields of international law the uncertainties attached to unwritten rules and to adjust them, where appropriate, to the current needs of an interdependent international community seeking peace and security and economic and social progress.

5. He was happy to inform the Commission that a new and up-to-date edition of the booklet entitled "The Work of the International Law Commission" [2] would be published very shortly, in accordance with the Commission's recommendation of 1970 on the occasion of the celebration of the twenty-fifth anniversary of the United Nations.

[1] See *Statute of the International Law Commission*, article 8.

[2] United Nations publication, Sales No. F.67.V.4.